STATE OF SOUTH CAROLINA **COUNTY OF RICHLAND**	**IN THE COURT OF COMMON PLEAS** **FIFTH JUDICIAL CIRCUIT**
Nancy Morris, as Personal Representative of the Estate of David Allan Woods, Plaintiff, v. State Fiscal Accountability Authority, South Carolina Insurance Reserve Fund, Andrew J. Bland, Richard T. Burkholder, Leemon E. Carner, Priscilla Bland, and Jerry Speissegger, Jr., Defendants.	Civil Action No. 2015-CP-40-0619 **AMENDED ORDER ON DECLARATORY JUDGMENT**

This matter is before this Court on the Cross Motions for Summary Judgment filed by the Plaintiff as well as the Defendants State Fiscal Accountability Authority ("SFAA") and the South Carolina Insurance Reserve Fund ("IRF").[1] A hearing was conducted on March 28, 2018 with all counsel of record present.[2] After a review of the written submissions of the parties, the record presented, and the oral arguments of counsel, this Court issued an Order filed July 23, 2019, which granted the Plaintiff's motion for declaratory relief as it relates to the interpretation of S.C. Code Ann. § 1-11-460 and granted Defendants' interpretation of "occurrences" under the policy.

Thereafter, on August 2, 2019, Defendants filed a timely Motion to Alter or Amend Order pursuant to Rule 59(e), SCRCP. Defendants raised twelve different points for this Court's reconsideration related solely to the declaratory relief granted with respect to the interpretation of S.C. Code Ann. § 1-11-460. None of the parties challenged or sought reconsideration of the

[1] By Order filed March 27, 2018, the Court substituted the State Fiscal Accountability Authority as a party-defendant in place of the South Carolina State Budget and Control Board. Prior to the South Carolina Restructuring Act of 2014, the Insurance Reserve Fund was a Division of the South Carolina Budget and Control Board. Effective July 1, 2015, the South Carolina Budget and Control Board was abolished, and the Insurance Reserve Fund was transferred to the State Fiscal Accountability Authority, which was newly created.

[2] The Defendants Andrew J. Bland, Richard Burkholder, Leemon E. Carner, Priscilla Garrett Bland and Jerry Speissegger have never made an appearance in this action.

Court's ruling on the "occurrences" issue. The Court required the parties to submit additional briefing and held a lengthy hearing on October 3, 2019, with extensive arguments made by counsel for both sides. The Court has given a renewed and careful review of the issues raised by this case, and as permitted under Rule 59(e), the Court hereby issues an Amended Order granting Defendants' motion and denying the declaratory relief sought by Plaintiff on the bases addressed below.

INTRODUCTION

This is a declaratory judgment action filed by the Plaintiff Nancy Morris, as Personal Representative of the Estate of David Allen Woods, against the Defendants SFAA and IRF relating to judgments entered in a United States District Court action captioned *Morris v. Bland*, Civil Action Number 5:12-3177-RMG. That case was tried before a jury in October 2014. On October 17, 2014, the jury returned a verdict finding against five corrections officers at the Hill-Finklea Detention Center operated by Berkeley County.

FACTUAL BACKGROUND

On or about September 2, 2010, Decedent David Woods was tried and convicted in absentia by a bench trial on charges of Shoplifting Merchandise/Less than $2,000 and Animal Nuisance. On October 12, 2010, a bench warrant was issued for his arrest, and he was booked and taken into custody at Hill-Finklea Detention Center. Over the course of the next several weeks, Mr. Woods complained to jail and medical personnel of health problems, including but not limited to liver disease, intestinal pain, and blood in his stool.

On the night of Friday, November 5, 2010, Mr. Woods was reported to be lying down on the floor of his cell and shaking. Sergeant Priscilla Bland (then Priscilla Garrett) transferred him to a medical observation cell. This occurred at approximately 10:30 p.m. While the jail had medical personnel on-call 24 hours a day, 7 days a week, there were no medical personnel on site at that time. Additionally, no medical personnel were scheduled to work at the detention center during the weekend.

Over the next sixty hours, surveillance footage from the observation cell shows Mr. Woods soiling himself, lying in his own feces, shaking, trembling, and repeatedly falling. During this time, Defendants PFC Andrew Bland; Sgt Richard T. Burkholder; PFC Leemon E. Carner; Sgt Priscilla Bland (Garrett); and PFC Jerry Speissegger, Jr. (collectively "the County Defendants")

each had multiple interactions with Mr. Woods. None of them called for medical personnel or recommended that medical personnel be called.

At approximately 10:00 a.m. on Monday, November 8, 2010, Mr. Woods was found lying naked on the floor of his cell. EMS was called, and he was taken to Trident Medical Center. There, his hemoglobin was measured at 4, and his prognosis was considered "bleak." On November 11, 2010, Mr. Woods died of gastrointestinal bleeding from a duodenal ulcer.

The verdict against the County Defendants included the following: $500,000 in actual damages against all five officers jointly and severally, $1 million in punitive damages against Burkholder, $1 million in punitive damages against Priscilla Bland, $150,000 in punitive damages against Andrew Bland, $150,000 in punitive damages against Carner, and $150,000 in punitive damages against Speissegger. Following a motion for set-off, the actual damages were reduced to $171,875. Attorney's fees and costs under 42 U.S.C. § 1988 were also awarded as follows: attorney's fees in the amount of $354,923 and costs totaling $31,820.62. The Defendants appealed to the U.S. Court of Appeals for the Fourth Circuit, which affirmed the verdicts against each of the officers on November 16, 2016. *See Morris v. Bland*, 666 Fed. Appx. 233 (4th Cir. 2016). Independent of any court order, both sides stipulated that Plaintiff's attorney's fees for the appeal totaled $25,768.75. Total damages thus were as follows:

Damages	**Fees and Costs**
Actual damages: $171,875.00	Attorneys' Fees (trial): $354,923.00
Punitive damages Bland: $150,000.00	Costs: $31,820.62
Burkholder: $1,000,000.00	Attorneys' Fees (appeal): $25,768.75
Carner: $150,000.00	Post-Judgment Interest: $5,900.00
Garrett Bland: $1,000,000.00	
Speissegger: $150,000.00	
Total: $2,621,875.00	**Total**: $418,412.37
Grand Total: $3,040,287.37	

The IRF issued a Tort Liability Insurance Policy to its named insured Berkeley County, Policy Number T130080011, with includes liability limits of $600,000. Additionally, the policy provided coverage for "All expenses incurred by the Fund, all costs taxed against the insured in any suit defended by the Fund, and all interest on the entire amount of any judgement [sic] therein." Defendant IRF tendered $992,013.63 in partial satisfaction of the judgment entered. This partial satisfaction was intended to cover Plaintiff's attorneys' fees, costs, and post-judgment interest for a total of $392,013.63. The partial satisfaction also included the $600,000.00 liability policy limit. Defendant IRF separately tendered an additional $25,768.75 in satisfaction of attorneys' fees associated with the appeal. These payments reduced the amount of the outstanding judgment to $2,021,875.01.[3]

Plaintiff filed this Declaratory Judgment action to resolve the parties' dispute regarding the amount of available coverage under the policy. Plaintiff's Motion for Summary Judgment and Defendants' Cross-Motion for Summary Judgment followed.

LEGAL STANDARD

Under Rule 56(c), SCRCP, summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Zurich Am. Ins. Co. v. Tolbert*, 387 S.C. 280, 283, 692 S.E.2d 523, 524 (2010); *Medical Univ. of South Carolina v. Arnaud*, 360 S.C. 615, 602 S.E.2d 747 (2004). However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. *Hedgepath v. American Tel. & Tel. Co.*, 348 S.C. 340, 559 S.E.2d 327 (Ct. App. 2001), *cert. dismissed as improvidently granted*, 356 S.C. 256, 588 S.E.2d 598 (2003).

[3] Plaintiff executed a document captioned "Partial Satisfaction of Judgment" which includes the following language: "the Plaintiff acknowledges that in agreeing to tender the amounts stated herein, the South Carolina Insurance Reserve Fund, as a division of the State Fiscal Accountability Authority, expressly reserves and does not waive any defenses as asserted in the pending action captioned *Morris v. South Carolina Budget and Control Board*, Civil Action No. 2015-CP-40-0619."

1. INTERPRETATION OF S.C. CODE ANN. § 1-11-460

Plaintiff argues that S.C. Code Ann. § 1-11-460 requires Defendants to provide coverage for the verdict or judgment awarded in the underlying action. For the following reasons, this Court disagrees.

A. Applicability and Statutory Construction

S.C. Code Ann. § 1-11-460 is titled "Payment of judgments against governmental employees and officials in excess of one million dollars; limitations; recovery of amount paid by assessment against entities purchasing tort liability insurance." The statute provides that:

> The State Fiscal Accountability Authority… is authorized to pay judgments against individual governmental employees and officials, in excess of one million dollars, subject to a maximum of four million dollars in excess of one million dollars for one employee and a maximum of twenty million dollars in excess of five million dollars in one fiscal year. These payments are limited to judgments rendered under 42 U.S.C. Section 1983 against governmental employees or officials who are covered by a tort liability policy issued by the Insurance Reserve Fund. These payments are also limited to judgments against governmental employees and officials for acts committed within the scope of employment.

S.C. Code Ann. § 1-11-460 (1992).[4]

In construing the meaning and application of S.C. Code Ann. § 1-11-460, the key language is the "is authorized to pay" language. Plaintiff contends this language is mandatory, thereby requiring Defendants to pay judgments in excess of $1 million entered in a Section 1983 claim against a government employee acting within the scope of his employment. Defendants, in contrast, have construed that language to provide for discretionary authority in the SFAA.

Upon reconsideration of this issue, the Court agrees with Defendants' position for several reasons. First, "[i]t is well settled that statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result." *Joiner ex rel. Rivas v. Rivas*, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000). Thus, the Court finds instructive that the General Assembly used the language "is authorized to pay" in S.C. Code Ann.

[4] Plaintiff has referred to S.C. Code Ann. § 1-11-460 as providing "excess coverage." However, neither the SFAA nor the IRF has issued any excess insurance policy. The enabling legislation which creates the Insurance Reserve Fund, S.C. Code Ann. § 1-11-140, does not provide authorization from the General Assembly to issue an excess insurance policy or to provide excess insurance.

§ 1-11-460; yet, in statutes dealing with the same subject matter, the General Assembly also used clearly mandatory language such as "must indemnify" when it intended to make an indemnity payment mandatory. Specifically, the Court points to S.C. Code Ann. § 1-11-440, which is part of the same chapter of Title 1 of the Code of Laws as S.C. Code Ann. § 1-11-460. S.C. Code Ann. § 1-11-440 provides, in part, that "[t]he State must defend the members of the State Fiscal Accountability Authority and the Director of the Department of Administration against a claim or suit that arises out of or by virtue of their performance of official duties on behalf of the authority or the department, as applicable, and *must indemnify* them for a loss or judgment incurred by them as a result of the claim or suit, without regard to whether the claim or suit is brought against them in their individual or official capacities, or both." S.C. Code Ann. § 1-11-440. (Emphasis added). S.C. Code Ann. § 1-11-440, in fact, uses the term "must indemnify" three times and describes a "commitment to defend and indemnify." *Id*. In contrast, S.C. Code Ann. § 1-11-460 uses the term "is authorized to pay." This contrast in language used by the General Assembly in statutes in the same chapter of Title 1 strongly indicates to this Court that "must indemnify" and "is authorized to pay" have different meanings and create differing duties. This further shows that, where the General Assembly intended to make a duty to indemnify mandatory, it knew how to do so using the mandatory language "must indemnify." This Court therefore concludes that the use of the language "is authorized to pay" is not mandatory but rather creates a discretionary duty, which is consistent with how Defendants have construed S.C. Code Ann. § 1-11-460.[5]

Additionally, as Defendants have further shown, case law from South Carolina and other jurisdictions supports their construction of the "is authorized to pay" language. For instance, in the case of *Seminole Nation v. United States*, 318 U.S. 629 (1943), the United States Supreme Court held that the use of the word "authorized to bring suit" did not create an obligation in the

[5] The Supreme Court has held that "[t]he construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." *Dunton v. South Carolina Bd. of Examiners in Optometry*, 291 S.C. 221, 353 S.E.2d 132, 133 (1987). Defendants presented evidence that the SFAA and the IRF, being the governmental entities charged with administering S.C. Code Ann. § 1-11-460, have construed the statute "as enabling legislation that grants the Budget and Control Board and now the State Fiscal Accountability Authority the discretion as to whether to pay judgments in excess of $1 million entered in Section 1983 cases against individual governmental employees and officials acting within the scope of their employment with an agency or political subdivision that is a named insured with the IRF for tort liability insurance, subject to the caps cited in the statute." *See* Smith Aff., ¶ 3.

Secretary of the Interior but rather allowed for the exercise of discretion. The Supreme Court explained that "the use of the word 'authorized' in this context necessarily reserved to the Secretary the right to determine his own course of action." 318 U.S. at 639. Similarly, in *Hopi Tribe v. United States*, 55 Fed. Cl. 81 (2002), the Federal Claims Court concluded that a statute stating that "the Secretary of the Interior is authorized to pay ..." created a discretionary duty. The Claims Court explained that the statute at issue "merely stated that the Secretary 'is authorized' to reimburse the tribes for various types of legal fees" and "the plain language of the statute demonstrates that the Secretary's duty to compensate plaintiff under § 640d-7 is discretionary." 55 Fed. Cl. at 87. Also, in *Emmens v. United States*, 44 Fed. Cl. 524 (1999), the Federal Claims Court explained that "[t]he Attorney General is authorized to pay" language in 21 U.S.C. § 886(a) "vests in the Attorney General the discretionary authority to reward informants." 44 Fed. Cl. At 527. Likewise, in *State v. Elliott*, 169 S.C. 208, 168 S.E. 546, 550 (1933), the South Carolina Supreme Court held that a statute providing that a judge "is authorized to ..." provides for discretionary authority.[6] In contrast, Plaintiff has not cited any case where a court from any jurisdiction interpreted the "is authorized to pay" language as mandatory rather than discretionary. The plain and ordinary meaning of "to authorize" is not "to require" or "to mandate" some action. Instead, according to Black's Law Dictionary, "authorize" means "to give legal authority" or "to empower." Black's Law Dictionary (10th ed. 2014).

Upon reconsideration, the Court also finds the case of *Willcox v. Tennessee District Attorneys General Conference*, 2008 WL 4510031 (E.D. Tenn. 2008), to be instructive. *Willcox* involved the interpretation of a Tennessee state statute that authorizes the indemnification of state employees. Section 9-8-112 of the Tennessee Code of Laws provides, in part: "The board of claims *is authorized to pay* final judgments for state employees, as defined in § 8-42-101, for any damages, including interest thereon, which are awarded in a final judgment in a civil lawsuit against the employee in a court of competent jurisdiction where it is determined by the board that the incident on which such damages were awarded occurred when the employee was acting in good faith within the scope of such employee's official duty and under apparent lawful authority

[6] At the hearing held on October 3, 2019, Defendants' counsel also cited to several statutes in the South Carolina Code of Laws where "is authorized to pay" language provides for discretionary authority. *See e.g.*, S.C. Code Ann. § 5-21-620(3); S.C. Code Ann. § 63-7-2345; S.C. Code Ann. § 8-11-35(B).

or orders." Tenn. Code Ann. § 9-8-112(a)(1). (Emphasis added). The statute has the same "is authorized to pay" language as S.C. Code Ann. § 1-11-460. The Tennessee statute has been interpreted in *Willcox* as not *requiring* indemnification. Drawing a specific distinction between "authorizing" and "requiring," the actual cite from the Federal District Court is as follows: "While there is a state statute *authorizing* indemnification of state employees, Tenn. Code Ann. § 9-8-112, it does not *require* indemnification." 2008 WL 4510031, *4, n.3. (Emphasis in original).

The Tennessee statute has been the subject of much debate between the parties in this case. This Court originally read Section 9-8-112 of the Tennessee Code of Laws and its "is authorized to pay" language as creating a mandatory payment requirement. However, upon reconsideration and further study of the statutory scheme in Tennessee, the Court agrees with Defendants' view and finds the Tennessee statutory scheme to actually be similar to that in South Carolina. Both systems provide for two levels of indemnity. The first level is mandatory, and the second level is entirely discretionary for the determinative body, in Tennessee the board of claims and in South Carolina the SFAA. In Tennessee, the first level of indemnity is the tort claims limits of $300,000 per claimant and $1 million per occurrence, which is established by statute.[7] That level of indemnity is mandatory. In South Carolina, the first level of indemnity is provided by the IRF Tort Liability Policy rather than by statute. In this case, those limits are $600,000. However, in both systems, the second level of indemnity -- in excess of the initial limits set by statute in Tennessee and by insurance policy in South Carolina -- is purely discretionary. The key language that the Court has now focused upon is Section 9-8-112(h) of the Tennessee Code of Laws, which provides: "In cases where the judgment or settlement is in excess of the limits found in § 9-8-307(e), the board of claims *may pay* any of the amounts in excess of those limits where such reimbursement is found to bear a reasonable relationship to the officer's or employee's liability or the injury or damage caused." Tenn. Code Ann. § 9-8-112(h). (Emphasis added). Thus, as the words "may pay" show, this provision makes it clear that indemnity for claims in excess to the tort claims limits of $300,000 per claimant and $1 million per occurrence is purely discretionary for the board of claims. In sum, a proper reading of the Tennessee statutory scheme shows that indemnity paid by the board of claims is discretionary as the *Willcox* court recognized. Likewise,

[7] In Section 9-8-307(e), Tennessee provides for tort claims limits of $300,000 per claimant and $1 million per occurrence. Tenn. Code Ann. § 9-8-307(e).

S.C. Code Ann. § 1-11-460 -- using that same "is authorized to pay" language -- shows that indemnity paid by the SFAA is also discretionary.

Based on the foregoing analysis, the Court concludes that the language "is authorized to pay" as used in S.C. Code Ann. § 1-11-460 does not create a mandatory duty to indemnify on the part of Defendants. S.C. Code Ann. § 1-11-460 grants to the SFAA the discretion to determine on a case-by-case basis whether to pay a qualifying judgment in excess of $1 million entered in a Section 1983 case against individual governmental employees and officials acting within the scope of their employment with an agency or political subdivision that is a named insured with the IRF for tort liability insurance. It is, therefore, not the function of this Court to order the SFAA or the IRF to make such payment in the present case. That request for indemnification will need to be made to the SFAA in accordance with S.C. Code Ann. § 1-11-460. The County Defendants have not made such a request.

B. Lack of Guidelines or Criteria for Exercise of Discretion

In her supporting memorandum, Plaintiff argues that S.C. Code Ann. § 1-11-460 cannot be interpreting as vesting discretionary authority in the SFAA because the statute does not include criteria or guidelines on how the discretion is to be exercised. Plaintiff's position presupposes that S.C. Code Ann. § 1-11-460 creates a protected property interest or entitlement which its express language does not support. This Court does not conclude that due process safeguards are even required under the statutory scheme adopted by the General Assembly. Yet, even if subject to due process protections, the absence of regulations or guidelines does not violate due process. Under South Carolina law, discretionary authority is the same as quasi-judicial authority. In *Redmond v. Lexington County School District Four,* 314 S.C. 431, 445 S.E.2d 441 (1994), the Supreme Court explained that "[t]he duties of public officials are generally classified as ministerial and discretionary (or quasi-judicial)." 445 S.E.2d at 437. The Supreme Court further explained that "a quasi-judicial duty requires the exercise of reason in the adaptation of means to an end, and discretion in determining how or whether the act shall be done or the course pursued." 445 S.E.2d at 438. Discretionary or quasi-judicial authority does not require adopted guidelines in order to satisfy due process. Instead, the decision reached is simply not permitted to be arbitrary and capricious. *See State v. Dykes*, 403 S.C. 499, 744 S.E.2d 505, 507 (2013) ("the guarantee of due process … demands only that the law shall not be unreasonable, arbitrary, or capricious"). Here, Plaintiff is critical that the SFAA has no guidelines for the exercise of its discretion in evaluating

claims asserted under S.C. Code Ann. § 1-11-460. However, in *Tall Tower, Inc. v. South Carolina Procurement Review Panel*, 294 S.C. 225, 363 S.E.2d 683 (1987), the Supreme Court found no due process violation where formal rules or procedures had not been adopted by the Procurement Review Panel.

Nonetheless, it is undisputed that neither County Defendants nor Plaintiff after receiving the assignments have made a request to the SFAA for indemnity pursuant to S.C. Code Ann. § 1-11-460. As a result, it is premature to question the SFAA's decision-making process. The Court cannot rely on the Rule 30(b)(6) deposition testimony of Christopher Lombard, as submitted by Plaintiff, to conclude that discretion could not be appropriately exercised by the five members of the SFAA. Assuming a property interest is implicated, once a request is made and a decision is rendered by the SFAA on a request for indemnity, then there would be an opportunity to challenge that decision as being arbitrary or capricious. To conclude that a statute does not allow for discretion to be exercised simply because certain procedures for making and adjudicating a claim under S.C. Code Ann. § 1-11-460 have not been established is not properly before this Court. Accordingly, this Court concludes that Plaintiff's "due process" related arguments are premature and do not provide a basis for arguing that S.C. Code Ann. § 1-11-460 was not intended by the General Assembly to vest discretion in the SFAA.

C. S.C. Code Ann. § 1-11-460 Only Applies to Qualifying Judgments

S.C. Code Ann. § 1-11-460 is only applicable to qualifying judgments, meaning those in excess of $1 million entered in a Section 1983 case against individual governmental employees and officials acting within the scope of their employment. In the action captioned *Morris v. Bland*, Civil Action Number 5:12-3177-RMG, the judgment of $500,000 in actual damages was entered against the County Defendants jointly and severally. That amount was then reduced by the Federal District Judge to $171,875 to reflect an offset from the settling medical defendants. Given the joint and several judgment of $171,875 and the punitive damages awards of $150,000 each against Andrew Bland, Leemon Carner and Jerry Speissegger, the total judgments against those three County Defendants do not meet the $1 million threshold. However, given the punitive damages awards of $1 million each against Richard Burkholder and Priscilla Bland, the judgments against them are the only ones that meet the $1 million threshold (although they are not qualifying for other reasons discussed herein).

D. Payment of Punitive Damages

Defendants also argue that S.C. Code Ann. § 1-11-460 was never intended by the General Assembly to provide indemnity to a governmental employee for punitive damages awards. This Court agrees. In *Macmurphy v. South Carolina Department of Highways and Public Transportation*, 295 S.C. 49, 367 S.E.2d 150 (1988), the South Carolina Supreme Court explained that "[i]n the absence of statutory authority, there is no right to recover exemplary or punitive damages against a municipal corporation or state." 295 S.C. at 51, 367 S.E.2d at 151. The Supreme Court further concluded that "there is no statute authorizing the recovery of punitive damages from the State of South Carolina or its agencies." *Id.* The Supreme Court explained that "*recovery of punitive damages against governmental entities are contrary to sound public policy* because such awards would burden the taxpayers and citizens for whose benefit the wrongdoer is assessed punitive damages." *Id.* (Emphasis added).

As the *Macmurphy* opinion makes clear, the State and specifically the taxpayers should not be burdened with paying the punitive damages awarded against the five corrections officers in Civil Action Number 5:12-3177-RMG. Any payment of the punitive damages awarded under S.C. Code Ann. § 1-11-460 would violate public policy.

Plaintiff argues, however, that the General Assembly could have added the words "excluding punitive damage" to S.C. Code Ann. § 1-11-460 if the intent was to exclude indemnity for punitive damages. Plaintiff points to the statute's silence on the issue of punitive damages. This argument, however, disregards well-settled authority governing the waiver of sovereign immunity. Clearly, any governmental liability for punitive damages is in derogation of sovereign immunity. "Waivers of the Government's sovereign immunity, to be effective, must be 'unequivocally expressed'" in the legislation. *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33 (1992). *See also, United States v. Bormes*, 133 S.Ct. 12, 16 (2012). S.C. Code Ann. § 1-11-460, however, does not include any language that unequivocally provides that the State has waived sovereign immunity for the payment of punitive damages under S.C. Code Ann. § 1-11-460. As Plaintiff concedes, the statute is silent with respect to indemnifying for punitive damages. Therefore, this Court concludes that S.C. Code Ann. § 1-11-460 should be construed as providing for payments for compensatory or actual damages awards and not for punitive damages awards being claimed in this case.

E. Scope of Employment

Furthermore, in order to be a qualifying judgment, S.C. Code Ann. § 1-11-460 requires

that "[t]hese payments are also limited to judgments against governmental employees and officials for acts committed within the scope of employment." S.C. Code Ann. § 1-11-460. Therefore, in order to seek any payment under S.C. Code Ann. § 1-11-460, Plaintiff must first demonstrate that the judgment in Civil Action Number 5:12-3177-RMG was for acts committed within the scope of employment of the County Defendants. The jury in that action, however, never made any specific factual finding that the County Defendants were acting within the scope of their employment with Berkeley County when they were found to be deliberately indifferent to David Woods' medical needs.

The jury returned a special verdict form; however, the jury was never asked to answer any special interrogatories. Not only was there never any finding by the jury that the County Defendants were acting within the scope of their employment, there was no stipulation to that effect either. The jury simply was not asked to make that determination. It is certainly possible that the actions of the County Defendants were not within the scope of employment. Their deliberate indifference could have been motivated by malicious or personal reasons.[8] Under South Carolina law, it is well settled that intentional conduct by corrections employees that is personally and not professionally motivated falls outside the scope of employment. *See Pridgen v. Ward*, 391 S.C. 238, 705 S.E.2d 58 (Ct. App. 2010).

The "scope of employment" element of Plaintiff's claim under S.C. Code Ann. § 1-11-460 cannot be simply inferred. Moreover, South Carolina law actually precludes the Plaintiff from attempting to prove that element in a subsequent declaratory judgment action. The determination as to whether the County Defendants were acting within the scope of employment should have been made by the jury in Civil Action Number 5:12-3177-RMG. As the Supreme Court explained in *Auto Owners Ins. Co., Inc. v. Newman*, 385 S.C. 187, 684 S.E.2d 541 (2009), the purpose of a declaratory judgment action is not to "relitigate" any issue that could have been litigated in the underlying action. 684 S.E.2d at 547. Similarly, in *Chastain v. AnMed Health Foundation*, 388 S.C. 170, 694 S.E.2d 541 (2010), the Supreme Court explained that the number of occurrences under the Tort Claims Act cannot be litigated post-judgment. In that case, the jury was never

[8] It is important to note that "[d]eliberate indifference requires 'more than ordinary lack of due care for the prisoner's interests or safety.'" *Whitley v. Albers*, 475 U.S. 312, 319 (1986). "Deliberate indifference requires a showing that the defendants actually knew of and disregarded a substantial risk of serious injury to the [prisoner] or that they actually knew of and ignored a [prisoner's] serious need for medical care." *Young v. City of Mt. Ranier*, 238 F.3d 567, 575-76 (4th Cir. 2001).

instructed on the definition of occurrence nor asked to determine whether there was more than one occurrence either in the jury instructions or on the verdict form. Thus, the plaintiff lost the opportunity to prove multiple occurrences. The same is true in this case with the "scope of employment" issue. Plaintiff has not established that, based on the jury instructions and the verdict form, the jury concluded that the County Defendants were acting within their "scope of employment." The jury was never asked to make that determination, and thus Plaintiff cannot show that the judgment was entered against the County Defendants for acts committed within the scope of their employment.[9] For this additional reason, the Plaintiff has not proven her entitlement to relief under S.C. Code Ann. § 1-11-140, and the Plaintiff's claim for declaratory relief is denied.

2. PERSONAL LIABILITY OF ASSIGNORS IS EXTINGUISHED

Defendants also argue that Plaintiff has relinquished her standing to collect payment under S.C. Code Ann. § 1-11-140 by obtaining an assignment of rights and granting a covenant not to execute judgment to the County Defendants. On November 29, 2017, after filing her motion for summary judgment in the case at bar, Plaintiff filed an Amended Complaint in Civil Action Number 2017-CP-40-6773, which is a companion case, and attached thereto a copy of documents

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[9] Plaintiff contends that the parties in the federal court trial stipulated to the fact that the County Defendants were acting under "color of law" which is an element of a Section 1983 claim. Plaintiff thus argues that this stipulation demonstrates that the County Defendants were acting within the scope of their employment. This Court disagrees. The concepts of "color of law" in Section 1983 jurisprudence and the "scope of employment" language from S.C. Code Ann. § 1-11-460 are not synonymous. It is well settled that a governmental official may act beyond the scope of his employment while still be acting under "color of law." An obvious example of that is where a police officer uses his authority to stop a motorist and then commit a sexual assault. That conduct would be under color of law but not within the officer's scope of employment. *See Doe v. South Carolina Budget and Control Board,* 329 S.C. 214, 494 S.E.2d 469 (Ct. App. 1997). In *Coleman v. Smith,* 814 F.2d 1142 (7th Cir. 1987), the Seventh Circuit explained that "color of state law" should not be confused with the "scope of employment" requirement of an Illinois indemnity statute. The court explained that "[a] finding of the first element is not necessarily a finding as to the latter." 814 F.2d at 1149. Likewise, in *Graham v. Sauk Prairie Police Commission,* 915 F.2d 1085 (7th Cir. 1990), the Seventh Circuit held that "a finding that a public employee acted under 'color of law' for purposes of § 1983 does not automatically establish that the employee acted within the 'scope of employment' under an Wisconsin indemnity statute." 915 F.2d at 1093. The court further noted that the "'color of law' category is broader than the 'scope of employment' category." *Id.* Similarly, in *Anderson v. Moussa,* 250 F.Supp.3d 344 (N.D. Ill. 2017), in applying the Illinois indemnity statute, the federal district court explained that "'under color of' state law under § 1983 is not coextensive with 'scope of employment,'" and as a result, "even if Moussa was acting under color of state law, that would not by itself mean that he was acting within the scope of his employment." 250 F.Supp.3d at 350-51.

captioned "Assignment of Rights and Covenant Not to Execute." Plaintiff confirms that she has now received an assignment from the County Defendants, and in return, has entered into a Covenant Not to Execute extinguishing the personal liability of each of those parties. Defendants thus argue that those Covenants Not to Execute render the current action non-justiciable because the County Defendants are no longer personally liable for the judgments entered against them and on which the Plaintiff is seeking to recover from Defendants. This Court agrees with that analysis.

In support of their argument, Defendants cites the case of *Smalls v. Blackmon*, 269 S.C. 614, 239 S.E.2d 640 (1977), where the Supreme Court ruled that "[a]n insurance carrier is in the same legal position as its insured. A liability carrier only contracts to pay any debt the insured is liable to pay." 239 S.E.2d 640 at 641. S.C. Code Ann. § 1-11-460, while not an excess insurance policy as Plaintiff claims, is nonetheless a type of indemnification statute. As such, Plaintiff is now precluded under basic principles of indemnity as described in *Smalls* from recovering under S.C. Code Ann. § 1-11-460. Quite simply, because the prospective indemnitees (the County Defendants) are no longer personally liable -- an undisputed fact given the language of the Covenants not to Execute -- then any duty to indemnify under S.C. Code Ann. § 1-11-460 is likewise extinguished. Fundamentally, an indemnitor cannot be deemed liable when the indemnitee is not liable.

In effect, when Plaintiff entered Covenants Not to Execute and relieved the County Defendants of their personal liability to pay the judgments, the IRF was also relieved of any further liability under the Tort Liability Policy. It also relieved the SFAA of any liability or statutory obligation it may have to indemnify the County Defendants under S.C. Code Ann. § 1-11-460. Thus, there is no longer any need for the declaratory relief sought by Plaintiff. The issues of statutory construction related to S.C. Code Ann. § 1-11-460 and the issues of policy interpretation are now moot.

3. MULTIPLE OCCURRENCES

The insurance policy at issue in this matter provides for a $600,000 liability limit "as applicable to each occurrence." "Occurrence" is defined under Section III of the policy as "an accident, including continuous or repeated exposure to conditions, which results in personal injury or property damage neither expected nor intended from the standpoint of the insured." Section V adds that, "For the purpose of determining the limit of the Fund's liability, all personal injury and property damage arising out of continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of one occurrence." The contract provides no

additional guidance in clarifying the term. As with any insurance policy, the terms of the contract "must be construed most liberally in favor of the insured and where the words of the policy are ambiguous, or where they are capable of two reasonable interpretations that construction will be adopted which is most favorable to the insured." *Kingman v. Nationwide Mut. Ins. Co.*, 243 S.C. 405, 411, 134 S.E.2d 217, 220 (1964).

Plaintiff argues that the actions of the five corrections officers constituted multiple occurrences under the IRF Tort Liability Policy issued to the named insured, Berkeley County. Plaintiff thus argues that each of the five officers was entitled to a separate limit of $600,000. The Court rejects that argument for two primary reasons.

The injury and resulting death of David Woods from what the jury found to be the same general conditions is but one occurrence. Plaintiff cannot dispute this because the actual damages award was entered jointly against the five corrections officers. *See Morris v. Bland*, 666 Fed. Appx. 233, 237 (4th Cir. 2016) ("[t]he jury awarded compensatory damages of $500,000 jointly"). In Section 1983 jurisprudence, "[j]oint and several liability is a theory of recovery which requires that the plaintiffs, in an action alleging tortious or constitutionally repugnant conduct by multiple actors, establish that each defendant acted in concert to produce a single, indivisible injury." *Harper v. Albert*, 400 F.3d 1052, 1061-62 (7th Cir. 2005). By obtaining a joint verdict against the officers, Plaintiff necessarily proved that the officers acted in concert to produce a single, indivisible injury. Thus, given the joint verdict, Plaintiff cannot now argue that the officers' acts or omissions, i.e., their deliberate indifference to Woods' medical needs, were not in concert or caused different injuries.

Second, the Plaintiff relies in error on the definition of "occurrence" from the South Carolina Tort Claims Act as well as the discussion of occurrences set forth in the South Carolina Supreme Court's decision in *Boiter v. South Carolina Department of Transportation*, 393 S.C. 123, 712 S.E.2d 401 (2011). The federal action against the County Defendants did not involve any state law claims under the Tort Claims Act. Those claims were alleged against Berkeley County only and were voluntarily withdrawn during the trial. Thus, the verdict obtained by the Plaintiff was not governed by the Tort Claims Act. Moreover, the term "occurrence" is defined in the Tort Claims Act as "an unfolding sequence of events which proximately flow from a single act of negligence." *See* S.C. Code Ann. § 15-78-30(g). That definition is substantially different from

the policy definition of "occurrence." As a result, the interpretation of the statutory definition by the courts has no bearing on the interpretation and application of the policy definition.

ORDER

THEREFORE, IT IS ORDERED that the Defendants' Motion to Alter or Amend Order is granted and this Amended Order is substituted for the Order filed July 23, 2019.

Further, for the reasons cited herein, **IT IS HEREBY DECLARED AND ORDERED** that S.C. Code Ann. § 1-11-460 grants the State Fiscal Accountability Authority with discretion to determine on a case-by-case basis whether to pay a qualifying judgment in excess of $1 million entered in a Section 1983 case against individual governmental employees and officials acting within the scope of their employment with an agency or political subdivision that is a named insured with the Insurance Reserve Fund for tort liability insurance.

IT IS FURTHER ORDERED that the actions of the five County Defendants constitute only one occurrence as defined in Policy Number T130080011 issued by the Insurance Reserve Fund to Berkeley County.

AND IT IS SO ORDERED.

SIGNATURE PAGE TO FOLLOW

Richland Common Pleas

Case Caption: Nancy Morris , plaintiff, et al vs South Carolina State Budget And Control Board , defendant, et al

Case Number: 2015CP4000619

Type: Order/Other

IT IS SO ORDERED!

s/ Alison Renee Lee, Chief Administrative Judge for 2020